

A CHASE PERDANA BHD

v.

MD AFENDI HAMDAN

B COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
TENGKU BAHARUDIN SHAH JCA
SULAIMAN DAUD JCA
C [CIVIL APPEAL NO: S-02-1263-2005]
27 FEBRUARY 2008

D **CONTRACT:** *Conditional contract - Contingent upon obtaining approval from relevant authorities - Conduct of parties - Conduct showed disregard of condition precedent - Effect - Whether parties estopped from relying on condition precedent subsequently - Deposit paid prior to refusal of approval - Whether irrecoverable*

E The appellant paid RM1 million to the respondent as deposit for the purchase of the respondent's shares in a company called Jernih Kaya Sdn Bhd. This aside, the appellant undertook to pay the balance RM4 million upon approval of the share acquisition being obtained from the Foreign Investment Committee ('FIC'). Subsequently, having executed the sale and purchase agreement – but without waiting for the FIC's approval – the appellant made a public statement announcing its acquisition of a controlling stake in Jernih Kaya Sdn Bhd. The FIC however refused approval, and the appellant hence claimed for the refund of the RM1 million deposit. Before the learned judge, the appellant put forth the argument that it was entitled to have the deposit returned because the condition precedent in the agreement, namely the FIC approval, had not been obtained. The respondent retorted that the appellant had, by its conduct, waived the requirement of the FIC approval and was hence estopped from relying on same as a condition precedent. The learned judge, upon appraisal of the facts, favoured the respondent's argument and consequently dismissed the appellant's claim and allowed the respondent's counterclaim. Dissatisfied, the appellant appealed.

H **Held (dismissing appeal and affirming order of High Court):**
I **Per Gopal Sri Ram JCA delivering the judgment of the court**

(1) It is a principle of general application that if an obligation in a contract is conditional on an occurrence of an event, then the occurrence or non-occurrence of the event will have the effect

of either necessitating or excusing the performance of the promise. The principle, as in the case of all general principles, is however subject to qualifications. (paras 5 & 8)

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- (2) If parties to a contract which is subject to a contingent condition (as is the case here) conduct themselves towards each other in such a way as to show that the condition is not to matter, then, neither can at a later stage seek to rely or insist upon such condition. This was indeed the basis upon which the learned judge decided this case. He was impressed by the appellant's conduct in relation to the FIC requirement. Having come to the conclusion that the appellant and the respondent had conducted themselves in such a way as to disregard the requirement of the FIC approval, the learned judge was entitled to find for the respondent on the counterclaim and against the appellant on its claim. (para 8)

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Bahasa Malaysia Translation Of Headnotes

Perayu membayar deposit sebanyak RM1 juta kepada responden bagi pembelian saham responden dalam syarikat yang dipanggil Jernih Kaya Sdn Bhd. Di samping itu, perayu juga mengakujaji untuk membayar baki RM4 juta selepas izin diperolehi dari Jawatankuasa Pelaburan Asing ('JPA') bagi pembelian tersebut. Berikutnya, selepas menandatangani perjanjian jualbeli – tetapi tanpa menunggu izin dari JPA – perayu membuat hebahan umum mengisytiharkan pengambilan pegangan kawalan olehnya di dalam Jernih Kaya Sdn Bhd. JPA bagaimanapun tidak memberikan izinnnya dan akibatnya perayu memfail tuntutan untuk mendapat kembali deposit RM1 juta tersebut. Di hadapan yang arif hakim perayu mengemukakan hujah bahawa ia berhak kepada pengembalian deposit kerana syarat duluan dalam perjanjian, iaitu izin JPA, telah tidak diperolehi. Responden membalas bahawa perayu telah meninggalkan syarat izin JPA tersebut melalui kelakuannya dan dengan itu tidak boleh membangkitkan izin berkenaan sebagai syarat duluan. Yang arif hakim, atas penelitian fakta-fakta, menyetujui hujah responden sekaligus menolak tuntutan perayu dan membenarkan tuntutan balas responden. Tidak berpuashati, perayu

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A Diputuskan (menolak rayuan dan mengesahkan perintah Mahkamah Tinggi)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

B (1) Menjadi satu prinsip am bahawa jika suatu obligasi di dalam kontrak itu bergantung kepada berlakunya sesuatu peristiwa, maka terjadi atau tidak terjadinya peristiwa itu akan menentukan sama ada janji yang dibuat wajib dilaksanakan ataupun tidak. Namun begitu, prinsip ini, seperti mana halnya dengan semua prinsip-prinsip am, tertakluk kepada syarat-syarat tertentu.

C (2) Jika pihak-pihak dalam satu kontrak yang tertakluk kepada satu syarat duluan (seperti mana kes di sini) saling menunjukkan tingkahlaku yang memperlihatkan bahawa mereka tidak kisah tentang syarat duluan tersebut, maka mereka tidak boleh kemudiannya menuntut untuk bergantung kepada syarat duluan tersebut. Ini malah adalah asas di atas mana yang arif hakim memutuskan kes di sini. Beliau terpengaruh dengan tingkahlaku perayu dalam hubungannya dengan syarat JPA. Setelah mencapai konklusi bahawa perayu dan responden berkelakuan sebegitu rupa sehingga menunjukkan bahawa mereka tidak lagi mempedulikan keperluan izin JPA, maka yang arif hakim berhak membuat keputusan yang berpihak kepada responden di dalam tuntutan balasnya dan secara yang menentang perayu di dalam tuntutannya.

Case(s) referred to:

Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1960] 26 MLJ 47 (*refd*)
National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 MLJ 211 (*refd*)

For the appellant - Francis Wong; M/s William Liaw, Chan & Co
For the respondent - Jeyan Marimuttu; M/s Marimuttu & Partners

[Appeal from High Court, Kota Kinabalu; Suit No: K22-126-1998]

H *Reported by Wan Sharif Wan Ahmad*

JUDGMENT

I Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] This appeal is directed against the judgment of the High Court at Kota Kinabalu dismissing the appellant's claim for the recovery of RM1,000,000 paid by it as deposit for purchase of shares from the respondent and against the judgment entered in the defendant's favour on his counterclaim. The brief facts relevant to this appeal are as follows.

[3] By a letter of undertaking dated 24 June 1997 the appellant agreed with the respondent to pay a sum of RM5,000,000 for the respondent's shares in a company known as Jernih Kaya Sdn Bhd. The letter of undertaking contained a term that the balance sum of RM4,000,000 would be paid upon approval of the transaction by the Foreign Investment Committee (FIC) and other relevant authorities. There is no dispute that the appellant paid the sum of RM1,000,000. Nor is there any dispute that the respondent handed over the shares in question with the transfer forms to the appellant. By a sale and purchase agreement dated 26 June 1997, the appellant entered into an agreement with Madrigal B. Gumba to purchase 900 shares (which included the respondent's shareholding) in Jernih Kaya Sdn Bhd. Shortly after these events, the appellant made a public statement announcing its acquisition of a controlling stake in Jernih Kaya Sdn Bhd. In consequence of this announcement the appellant's shares rose in value. Later, by a letter dated 12 January 1998 the FIC refused to give its approval for the proposed acquisition by the appellant.

[4] The appellant's case in the court below and before us is that it is entitled to have the deposit returned to it because the condition precedent in the agreement, namely, the FIC approval had not been obtained. The respondent, on the other hand, contended that the appellant had by its conduct waived the requirement of the FIC approval and is in any event estopped by its conduct from relying on the said approval as a condition precedent. The learned judge found for the respondent. He was no doubt impressed by the appellant's conduct both before and after the letter of undertaking was executed.

[5] It is a principle of general application that if an obligation in a contract is conditional on an occurrence of an event then the occurrence or non-occurrence of the event will have the effect of either necessitating or excusing the performance of the promise. So if A agrees with B that he will pay B if X approves the transaction and if X does approve the transaction A must pay B. If X does not approve the transaction then he need not.

- A [6] The leading authority on the subject is *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1960] 26 MLJ 47. In that case, the appellant agreed to sell an estate to the respondent. However, the sale was conditional upon the appellant obtaining a renewal of certain leases. The respondent paid the deposit required to be paid under the agreement. As it happened the appellant did not obtain the renewal of the leases in question. The respondent sued to recover the deposit. It was held by the Privy Council that the respondent was entitled to its deposit. On a proper construction of the contract in that case, the respondent's obligation to pay the balance of the purchase price did not arise if the appellant did not obtain the renewal of the leases.

- D [7] Similarly, in *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 the respondent in that case had agreed to sell to the appellant certain lands. It was a condition of the sale and purchase agreement that the approval of the Foreign Investment Committee should be obtained. As it happened, such approval was refused. It was held that the sale and purchase had become void because the approval by the Foreign Investment Committee was a contingent condition.

- F [8] As in the case of all general principles, the one under discussion is also subject to qualifications. If parties to a contract which is subject to a contingent condition (which is the case in the present appeal) conduct themselves towards each other in such a way as to show that the condition is not to matter, then, neither can at a later stage seek to rely or insist upon such condition. This is the basis upon which the learned judge decided this case. He was, as we have earlier said, much impressed by the appellant's conduct in relation to the Foreign Investment Committee requirement. Having come to the conclusion that the appellant and respondent had conducted themselves in such a way as to disregard the requirement of the Foreign Investment Committee's approval, the learned judge was entitled to find for the respondent on the counterclaim and against the appellant on its claim.

- I [9] In a case of this nature where so much turns on the credibility of the witnesses in relation to their conduct in relevant circumstances it is the duty of this court to defer to the views formed by the primary trier of fact. The learned judge in the instant case having had the audio-visual advantage, which we in

this court plainly lack, he is entitled to have his findings undisturbed unless it can be clearly demonstrated that he was plainly wrong. In our judgment the appellant has failed to discharge this burden in the appeal before us. A

[10] For the reasons already given, this appeal is dismissed. The orders of the High Court are affirmed. The appellant must pay the respondent the costs of this appeal. The deposit to be paid to the respondent to account of his taxed costs. The judgment sum deposited in court pursuant to the order of this court dated 13 March 2006 is hereby directed to be paid out to the respondent. B C

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